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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 198

THE CHEROKEE NATION, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

PREVIOUS OPINIONS IN THE CASE

This is an appeal from the judgment of the Court of Claims (R. 27) reported in 59 Ct. Cls. 862. Prior judgments in a case dealing with the same questions are reported in 40 Ct. Cls. 252, and, on appeal, in 202 U. S. 101.

JURISDICTION

The judgment to be reviewed is that of the Court of Claims of June 23, 1924, dismissing the petition. The judgment appears on page 27 of the Record. The Cherokee Nation filed its application for appeal on September 19, 1924, under the provisions of the special jurisdictional Act of March 3, 1919

(Chap. 103, 40 Stat. 1316), (set forth at page 23 of this brief), which application was allowed by the court below on October 13, 1924. (R. 27.)

THE QUESTIONS INVOLVED

The controversy here is largely over the question whether the United States should pay the Cherokee Nation compound interest on certain obligations of the United States to the Indians, the payment of which was delayed.

In 1891 the United States agreed to submit a statement of certain sums alleged to be owing from it to the Indians, and, if the Indians accepted the statement, to appropriate and pay the amount shown on the statement before the end of the next session of Congress. The statement was rendered and showed there was owing to the Cherokee Nation certain principal items and interest thereon "until paid." This was approved by the Indians and Congress should have appropriated the necessary funds by March 4, 1895, but did not do so until some years later.

The Cherokee Nation contends that on failure to make the payments by March 4, 1895, the principal and accrued interest to date of default should have been added together to form a new principal sum, on which interest should thereafter have been computed.

The United States contends that upon its failure to pay on March 4, 1895, its obligation, as before, was to pay the principal items with simple interest

thereon until such principal items were paid, and that no compounding of interest is justified.

It appears also that in 1905 a judgment was rendered in the Court of Claims in favor of the Cherokee Nation and against the United States providing for the payment of the principal items above mentioned, with interest thereon *until paid,* at the rate of 5 per cent per annum. The correctness of this judgment is being reexamined here under authority of an Act of Congress; but assuming that the judgment was correct, in providing only for simple interest up to the date of the judgment, not compounded as of March 4, 1895, the Cherokee Nation further contends that the amount of the principal items, with simple interest to the date of the judgment, should have been treated as a new principal sum as of the date of the judgment upon which interest should thereafter have been compounded.

The United States contends that the judgment was not for a lump sum, but expressly provided for the payment of the principal items with simple interest thereon at the rate of 5 per cent per annum until the principal items were paid, thus directing the manner and rate of computation of interest subsequent to the date of the judgment, and that the amounts actually paid by the United States in satisfaction of the judgment equalled or exceeded the amount required to be paid by the terms of the judgment.

STATEMENT

The controversy between the Cherokee Indians and the United States as to what, if any, amounts were owing from one to the other has been rather extended, and some details thereof have been twice considered by this Court. In the case of *United States* v. *Old Settlers,* 148 U. S. 427, the claims of the Old Settlers or the Western Cherokees were considered, and in the case of *United States* v. *Cherokee Nation,* 202 U. S. 101, the claims of the Cherokee Nation as a whole, including Eastern and Western branches, were given full and careful consideration. The reports of these cases as well as the report in the Court of Claims of the decision in the case of the *Cherokee Nation* v. *United States* (40 Ct. Cls. 252, affirmed 202 U. S. 101) give a detailed statement of the transactions between the United States and the Cherokee Nation. It is not necessary for a proper presentation of the case at bar to go into a detailed discussion of such facts, but a summary will be sufficient and will prove helpful.

History of relations between the Cherokee Nation and the United States leading to the present controversy

Prior to 1808, the Cherokee Nation occupied lands in certain southeastern states of the United States, especially Florida, Georgia, Alabama, the Carolinas, and Tennessee. Part of the Nation wished to remain and engage in agricultural and other civilized pursuits, while another part desired

to continue as hunters and to follow their previous habits. The difference was taken up with the President of the United States, and he advised that the United States would consider and treat as neighbors those who wished to remain in the East, and that those who wished to continue as hunters should send an exploring party into the unoccupied lands in the Western part of the United States and select their future home. (40 C. Cls. 255, 256.) The exploring party was sent, and lands in what is now the State of Arkansas were selected. The Treaty of 1817 (7 Stat. 156) was entered into, which in substance provided that the Cherokees should cede certain lands in the East to the United States, the amount thereof to be determined with regard to the total lands occupied by the Cherokee Nation and the number of Cherokees emigrating to the West and the number remaining in the East. It was further provided that the United States should grant lands of equal area in the West to those ceded by the Cherokees in the East. There were also other provisions concerning the removal of the Cherokees, and certain payments to be made, which are not necessary here to consider.

In 1819 another treaty was entered into between the Cherokees and the United States (7 Stat. 195) to settle questions arising out of the Treaty of 1817. In the Treaty of 1819 it was estimated that about one-third of all of the Cherokees had emigrated to the West.

In 1828 (7 Stat. 311) a treaty was entered into between the Western Cherokees, or those who had emigrated West, and the United States, by which it was provided, among other things, that the Cherokees should release the lands in Arkansas, and in lieu thereof should be given a tract of approximately 7,000,000 acres in what is now Oklahoma, together with an outlet to the West. This outlet was thereafter known as the Cherokee Outlet. Certain payments by the United States were also provided for in this treaty, which it is not necessary here to consider. The Western Cherokees moved to the new lands provided for in said treaty, and the payments specified therein were made by the United States. (40 C. Cls. 262.)

By a treaty in 1833 (7 Stat. 414) the boundaries of the properties granted in the Treaty of 1828 were more definitely fixed and limited.

In February, 1835, a delegation of the Eastern Cherokees having authority to make a treaty agreed with the United States to submit to the Senate the question of how much should be paid for their claims and for a cession of their lands east of the Mississippi River. In March, 1835, the Senate, by resolution, advised that a sum not exceeding $5,000,000 should be paid. The Cherokee delegation then refused to submit propositions looking to a treaty in accordance with such sum. (40 C. Cls. 263.) At about the same time another delegation, representing only a portion of the Eastern Cherokees, negotiated for a treaty, and

submitted the results thereof to the Cherokee Nation, where it was rejected upon the ground that it was proposed to deduct from the $5,000,000 the cost of the removal of the Indians. (40 C. Cls. 263, 264.)

In December, 1835, a treaty between the Cherokees and the United States was entered into. Neither the Western Cherokees (or Old Settlers), nor the great body of the Eastern Cherokees were parties thereto, and they often repudiated same. This was known as the Treaty of New Echota. (40 Ct. Cls. 265.) Such treaty (7 Stat. 478) provided, among other things, for the cession of the Cherokee lands in the East to the United States, and for a release of all claims, the United States to pay $5,000,000. The United States agreed to remove the Eastern Cherokees to the West and to provide a year's subsistence. It was also provided that the question of whether the Senate intended that said sum of $5,000,000 include payment for spoliations should be submitted to the Senate, and if no such allowance had been made then an additional $300,000 should be paid to the Indians for the same; that the United States should deduct certain claims it had against the Indians and removal and subsistence expense, and after such deductions and the investment in certain trust funds therein specified, the remainder of said $5,000,000 should be divided among the Eastern Cherokees; that the United States should grant an additional 800,000 acres in the West to the Cherokee Nation, for which there

should be deducted from the said sum of $5,000,000 the sum of $500,000.

When this Treaty of 1835 was adopted by the Senate in May of 1836 (7 Stat. 488) certain supplementary articles were adopted as a part thereof, and, among other things, it is therein provided that an additional sum of $600,000 should be allowed to the Cherokee Nation to pay for their removal to the new lands in the West and for spoliations. (40 Ct. Cls. 267, 268.)

However, only a few of the Eastern Cherokees removed as contemplated by such treaty. An effort to bring about their removal continued, until, in 1838, after they had been concentrated into camps by the military forces of the United States, they yielded to such superior force, and under their own leaders moved West. (40 C. Cls. 268, 269.) Prior to such removal certain leaders of the Cherokees asked that they be permitted to remove themselves, but at the expense of the United States, and at the request of the Secretary of War (40 C. Cls. 270) Congress, on June 12, 1838, appropriated over a million dollars for the payment for removal and subsistence, with the proviso that no part of the same should be deducted from the $5,000,000 fund. (Chap. 98, 5 Stat. 241, 242.) The United States actually paid for the removal of the Eastern Cherokees about $1,500,000, of which amount $1,111,284.70 was taken from the $5,000,000 fund contemplated by the Treaty of 1835. (40 C. Cls. 271.)

After the removal of the Eastern Cherokees, leaders of both the Eastern and Western Cherokees met, and on July 12, 1838, entered into an agreement for the uniting of the separate branches of such Nation. (40 C. Cls. 271, 272.)

Considerable strife existed between the Eastern and Western Cherokees over the control of the government of such Nation; the Western Cherokees contending that the Eastern Cherokees, coming to their country, must accept the existing form of their government, and the Eastern Cherokees, who greatly outnumbered the Old Settlers, insisting that a new government should be established, and by virtue of their greater numbers they would naturally control the same. (148 U. S. 443, 444; 40 C. Cls. 274.) Finally, out of all this difficulty, and in an effort to terminate the same, the Treaty of 1846 (9 Stat. 871) was made. This treaty in substance provided that its purpose was to restore peace and make final settlement, and to make all of the Cherokee Indians parties to the Treaty of New Echota (1835); that the lands granted by the United States in the Treaty of 1828, as well as the 800,000 additional acres purchased from the United States under the Treaty of 1835, should belong to the entire Cherokee Nation, and not to the Western Cherokees alone; that the $5,000,000 payment provided for in the Treaty of 1835 should be reimbursed by the United States for certain moneys theretofore improperly charged to said fund, in-

eluding payments made for improvements, spoliations, treaty expense, etc.; that both the Western lands of the Cherokees, together with all claims growing out of the Eastern lands of the Cherokees should belong to both the Eastern and Western Cherokees; that after deducting proper charges, expenses, etc., from the $5,600,000 fund created by the Treaty of 1835 and the subsequent Act of Congress making appropriation of $600,000, one-third of the fund so remaining should be distributed per capita among the Western Cherokees known as the Old Settlers, the Old Settlers to release to the United States all their claims to the Eastern lands, and to agree that the lands in the West, including therein the 800,000 additional acres purchased by the Indians, and the Cherokee Outlet, should be the common property of all the Cherokee Indians. It was also provided that the United States would make a settlement of all moneys due the Cherokees, and that the question of whether the year's subsistence paid by the United States for the Eastern Cherokees after their arrival in the West, should be charged to the treaty fund "*and also the question, whether the Cherokee Nation shall be allowed interest on whatever sum may be found to be due the nation, and from what date and at what rate per annum*" (Italics ours) should be submitted to the Senate of the United States for its decision.

The Senate, by resolution of September 5, 1850 (Senate Journal, 31st Congress, 1st Session, p.

602), determined that the subsistence should be paid by the United States, and

> Resolved, That it is the sense of the Senate that interest at the rate of five per cent per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the twelfth day of June, eighteen hundred and thirty-eight, until paid.

The accounting officers of the Government stated an account with the Cherokees in pursuance of the Treaty of 1846, in which it was determined that over $1,500,000 was due to the Cherokee Nation, one-third of which was distributable to the Western Cherokees, and Congress appropriated (9 Stat. 556) for such amount payable to the Western Cherokees, with interest thereon at 5% from June 12, 1838, and such sum was distributed to the Western Cherokees per capita. (40 C. Cls. 280.)

The accounting officers also stated an account with the Cherokee Indians which showed over $700,000 due to the Eastern Cherokees, and Congress also appropriated for the payment of that amount, with interest at 5% from June 12, 1838 (Chap. 91, 9 Stat. 544, 572, 573), which was paid and distributed to the Eastern Cherokees per capita and the final release required by the Appropriation Act was executed. (40 C. Cls. 281.)

The Cherokees continued to complain concerning the charging of the removal expense to the $5,000,000 treaty fund provided in the Treaty of

1835, and made other complaints concerning the accounts with the United States, and these complaints resulted in the Act of February 25, 1889 (Chap. 238, 25 Stat. 694), giving jurisdiction to the Court of Claims to determine the claims of the Old Settlers or Western Cherokees. The Court of Claims made a determination in such case, (27 C. Cls. 1) and on appeal this Court in substance affirmed the Courts of Claims (only slightly changing the amounts found by the Court of Claims). This resulted in the entry of a judgment in favor of the Old Settlers and against the United States in the sum of $212,376.94, with interest at the rate of 5% from June 12, 1838, to the date of the decree (148 U. S. 427), to which was added a further sum of $4,179.26; and upon such judgment the sum of $745,273.84 principal and interest was paid. (40 C. Cl. 287.)

FACTS OF THE PRESENT CONTROVERSY

Under the Act of Congress approved March 2, 1889 (Chap. 412, 25 Stat. 980, 1005), the President appointed commissioners to negotiate with the Cherokees for the cession to the United States of the lands in the Cherokee Outlet. (40 Ct. Cls. 288.) The Indians insisted that certain balances were due to them. After prolonged negotiations, on December 19, 1891, an agreement was made which provided for the cession to the United States by the Cherokees of the so-called Cherokee Outlet (R. 14), and also provided (R. 14–16):

"Article II. For and in consideration of the above cession and relinquishment the United States agrees:

* * * * *

" 'Fourth. The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835, 1836, 1846, 1866, and 1868, and any laws passed by Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve (12) months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or, if it shall be found

upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation upon the order of its national council, such appropriation to be made by Congress if then in session, and if not, then at the session immediately following such accounting.

* * * * *

" ' Sixth. That in addition to the foregoing enumerated considerations for the cession and relinquishment of title to the lands hereinbefore provided the United States shall pay to the Cherokee Nation, at such time and in such manner as the Cherokee National Council shall determine, the sum of eight million five hundred and ninety-five thousand seven hundred and thirty-six and twelve one-hundredths ($8,595,736.12) dollars in excess of the sum of seven hundred and twenty-eight thousand three hundred and eighty-nine and forty-six one-hundredths ($728,389.46) dollars, the aggregate of amounts heretofore appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas River, and also in excess of the amount heretofore paid by the Osage Indians for their reservation. So long as the money or any part of it shall remain in the Treasury of the United States after this agreement shall have become effective, such sum so left in the Treasury of the United States shall bear interest at the rate of five per centum per annum, payable

semi-annually: *Provided,* That the United States may at any time pay to said Cherokee Nation the whole or any part of said sum and thereupon terminate the obligation of the United States in respect to so much thereof as shall be so paid and in respect to any further interest upon the same * * *.

* * * * *

It is expressly understood that this agreement, ceding and relinquishing the title to the lands herein described, shall not be effective for any purpose whatever until it shall in its entirety be ratified by Congress and the amount of money herein agreed to be paid to the Cherokee Nation for such cession and relinquishment shall have been appropriated by Congress and placed in the Treasury of the United States subject to the order of the Cherokee National Council: *Provided further,* That nothing contained in this agreement shall have the effect to limit or impair any rights whatever the Cherokee Nation has in or to or over the lands herein ceded until it shall be so ratified by Congress: *And provided further,* That if this agreement shall not be ratified by Congress, and the appropriation of money, as herein provided for, made on or before March 4, 1893, it shall be utterly void.' "

This agreement was approved by the Cherokee Indians (R. 16) and by the United States by the Act of March 3, 1893 (Chap. 209, 27 Stat. 612, 640), which Act appropriated upon the cash consideration for the cession of the Cherokee Outlet of

$8,595,736.12, the sum of $295,736.00 to be immediately available, and the remaining sum of $8,300,000, or so much as is required to carry out the provisions of the said agreement as amended, and according to said Act, to be payable in five equal installments commencing on March 4, 1895, and ending on March 4, 1899, said deferred payments to bear interest at the rate of 4% per annum to be paid annually. The amount required for the payment of the interest was also appropriated. Said Act of March 3, 1893, also provided that the acceptance by the Cherokee Nation of any of the moneys so appropriated, should be considered as a ratification by them of the amendments to the agreement of 1891. The sum of $5,000 was appropriated to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to render a complete account as contemplated in the agreement of 1891. On May 17, 1893, a deed of cession was executed and delivered by the Cherokees to the United States, and the first installment of the purchase money was paid and accepted, and the United States took possession of the land. (R. 16.)

James A. Slade and Joseph T. Bender, two expert accountants, were employed by the United States to prepare the account provided for in the agreement of 1891. (R. 17.) And on April 28, 1894, they filed their account with the Secretary of the Interior, which account was as follows (R. 17):

Under the treaty of 1819:

Value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the "school" fund----------	$2,125.00
(With interest from Feb. 27, 1819, to date of payment.)	

Under the treaty of 1835:

Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund----------	1,111,284.70
(With interest from June 12, 1838, to date of payment.)	

Under the treaty of 1866:

Amount received by receiver of public moneys at Independence, Kans., never credited to Cherokee Nation----------	432.28
(With interest from Jan. 1, 1874, to date of payment.)	

Under Act of Congress, March 3, 1893:

Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund----------	20,406.25
(With interest from July 1, 1893, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments.)	

The Secretary of the Interior transmitted this account to the Cherokee Nation where it was approved on December 1, 1894, and was then transmitted by the Secretary to Congress on January 7, 1895. Congress, then in session, failed to make any appropriation to pay the amounts found due, and adjourned *sine die* on March 4, 1895. (R. 17.) No

action was taken by Congress upon the Slade and Bender account until by the Act of July 1, 1902 (Chap. 1375, 32 Stat. 716, 726) it was provided (R. 18):

> Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with the right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee Tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this Act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof * * *.

This jurisdictional act was amended by the Act of March 3, 1903 (Chap. 994, 32 Stat. 982, 996) so as to permit certain groups to be considered as "bands" of Cherokees, and thus bring suit to have their claims adjudicated.

Under these Acts the Cherokee Nation brought suit, claiming the whole amount with interest found due by the Slade and Bender account. Thereafter, the Eastern Cherokees and also the Eastern and Emigrant Cherokees each brought suit (R. 18), and the three suits were consolidated and decided by the Court of Claims (40 C. Cls. 252), and judgment was rendered by the Court of Claims on May 18, 1905, as follows (R. 19):

It is, this 18th day of May, A. D. 1905, adjudged, ordered, and decreed that the plaintiff, the Cherokee Nation, do have and recover of and from the United States as follows:

Item 1: The sum of	$2,125.00
With interest thereon at the rate of 5 per cent from Feb. 27, 1819, to date of payment.	
Item 2: The sum of	1,111,284.70
With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.	
Item 3: The sum of	432.28
With interest thereon at the rate of 5 per cent from Jan. 1, 1874, to date of payment.	
Item 4: The sum of	20,406.25
With interest thereon from July 1, 1903, to date of payment.	

It is important to note that this judgment was not for a lump sum, but directed payment of the principal items of the Slade and Bender audit, with interest thereon "to date of payment," thus providing that these items should continue to bear interest after the date of the judgment.

This decision was affirmed by this Court with a very slight modification as to the designation of those to whom part of such money should be paid, but with no change in other respects (202 U. S. 101), and on May 28, 1906, the Court of Claims entered a decree modifying its former decree, in accordance with the mandate of this Court, and fixed the compensation of the attorneys representing the Cherokees. (R. 19.) In

the Act of June 30, 1906 (Chap. 3912, 34 Stat. 634, 664), appropriation was made for the payment of the judgment of the Court of Claims as follows (R. 19, 20):

> To pay the judgment rendered by the Court of Claims on May eighteenth, nineteen hundred and five, * * * aggregating a principal sum of one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, as therein set forth, with interest upon the several items of judgment at five per centum, one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, together with such additional sum as may be necessary to pay interest, as authorized by law.

The Act of June 30, 1906, was amended by the Act of March 4, 1909 (Chap. 298, 35 Stat. 907, 938, 939), which provided (R. 20):

> That the general deficiency appropriation Act of June thirtieth, nineteen hundred and six, so far as the same provides for the payment of item 2 of the judgment of the Court of Claims of May eighteenth, nineteen hundred and five, in favor of the Eastern Cherokees, shall be so construed as to carry interest on said item 2 up to such time as the roll of the individual beneficiaries entitled to share in said judgment shall be finally approved by the Court of Claims, and for the payment of said interest a sufficient sum is hereby appropriated.

On March 15, 1910, the Court of Claims entered an order approving the roll of individuals entitled to share in the distribution of item 2 of the judgment. (R. 20.)

By Section 18 of the Act of June 30, 1919 (Chap. 4, 41 Stat. 3, 21), it was provided that (R. 20):

> For payment of interest upon certain interest-bearing trust funds belonging to the Cherokee Nation, which funds arose from the judgment of the Court of Claims of May 18, 1905, in favor of said Nation, and were paid into and retained in the Treasury of the United States, as follows, to wit:
>
> On the amount of the fund which arose from item 1 of said judgment as such amount was determined and paid to the Secretary of the Interior on July 2, 1906, to be by him credited to the principal of the Cherokee school fund, interest at 5 per centum per annum from July 2, 1906, to and including May 26, 1910; on the amount of the fund which arose from item 4 of said judgment, as such amount was determined and paid to the Secretary of the Interior on July 2, 1906, to be by him credited to the principal of the Cherokee national fund, interest at 5 per centum per annum from July 2, 1906, to and including May 26, 1910; on the original principal sum of item 4 of said judgment, interest at 5 per centum per annum from July 1, 1893, to July 1, 1903, and on the amount of the interest thus accruing interest at 4 per centum per annum from December 29, 1905, to May 14, 1906;

> and on the aggregate of the sums of the interest for the last two periods hereinabove mentioned, interest at 5 per centum per annum from July 2, 1906, to the date of the passage of this Act; and the sum of $27,500, or so much thereof as may be necessary, to pay the interest above allowed, is hereby appropriated and authorized to be paid to the Cherokee Nation: *Provided,* That the Secretary of the Treasury is hereby authorized and directed to pay the amount arising from item 4 of said judgment, with interest thereon as hereinabove provided for, to the agent appointed by the Cherokee Nation acting through its principal chief to receive the same, said payment to be made immediately upon the approval of this Act.

In payment of item 1 of said judgment, the principal of which item amounted to $2,125.00, the Government paid the sum of $13,706.18, which included interest. (R. 21.) Under item 2, the amount of the principal is $1,111,284.70, and the total paid, including interest, was $5,098,361.08. Under item 3 the principal was $432.28, and the total paid, including interest, was $1,140.49. Under item 4 the principal was $20,406.25, and the total paid, including interest, was $44,797.79. The Government paid upon said judgment for principal and interest the sum of $5,158,005.54. (R. 21, 22, 23.) The dates of such payments by the Government, and to whom they were made, is shown in Finding IX of the court below. (R. 23.)

By the Act of March 3, 1919 (Chap. 103, 40 Stat. 1316) it was provided (R. 11, 12):

> That jurisdiction is hereby conferred upon the Court of Claims to hear, consider, and determine the claim of the Cherokee Nation against the United States for interest, in addition to all other interest heretofore allowed and paid, alleged to be owing from the United States to the Cherokee Nation on the funds arising from the judgment of the Court of Claims of May eighteenth, nineteen hundred and five (Fortieth Court of Claims Report, page two hundred and fifty-two) in favor of the Cherokee Nation. The said court is authorized, empowered, and directed to carefully examine all laws, treaties, or agreements, and especially the agreement between the United States and the Cherokee Nation of December nineteenth, eighteen hundred and ninety-one, ratified by the United States March third, eighteen hundred and ninety-three (Twenty-seventh Statutes at Large, page six hundred and forty, section ten), in any manner affecting or relating to the question of interest on said funds, as the same shall be brought to the attention of the court by the Cherokee Nation under this Act. And if it shall be found that under any of the said treaties, laws, or agreements interest on one or more of the said funds, either in whole or in part, has not been paid and is rightfully owing from the United States to the Cherokee Nation, the court shall render final judgment

> therefor against the United States and in favor of the Cherokee Nation, either party to have the right to appeal to the Supreme Court of the United States as in other cases. The said claim shall be presented within one year after the passage of this Act by petition in the Court of Claims by the Cherokee Nation as plaintiff against the United States as defendant, * * *.

Appellant filed suit on February 5, 1920, and its amended petition was filed March 12, 1923. (R. 11.) The suit was based on the theory that the principal items found owing to the Indians in the Slade and Bender statement should have carried interest at the rate of 5 per cent. per annum from the respective dates specified in the Slade and Bender statement to March 4, 1895, the date on which Congress should have appropriated the money for payment of the items included in the Slade and Bender statement, and that, on account of the default in this payment on March 4, 1895, the Cherokee Nation was entitled to have the principal items and the accrued interest to March 4, 1895, added together to form a new principal sum on which interest should thereafter have been computed. In its brief in this Court, the appellant contends, as an alternative to the above claim, that if interest is not to be compounded as of March 4, 1895, or a new principal calculated as above stated, nevertheless a like calculation should have been made as of May 18, 1905, the date of the judgment

in the Court of Claims, and the principal items covered by the Slade and Bender statement, with accrued interest to May 18, 1905, the date of that judgment, should have been treated as a new principal, bearing interest thereafter at the rate of 5 per cent. per annum.

ARGUMENT

SUMMARY

I. The Act of March 3, 1919, under which this suit is brought, should be construed as conferring jurisdiction on the Court of Claims to reexamine the matter of the liability of the United States for interest, without regard to the former adjudication of that question by the Court of Claims.

II. The obligation of the United States under the agreement of 1891 and the acceptance of the Slade and Bender audit was to pay on or before March 4, 1895, the principal items in the Slade and Bender audit, with simple interest thereon from the dates the liabilities arose until the payment of the principal items. The failure to pay at the time specified left the United States under a continuing obligation to pay the principal items and simple interest thereon until such principal items were paid. No general principle of law exists which in such a case requires compounding the interest by treating the principal and accrued interest to the date of the breach as a new principal. There is much in the treaties and agreements between the

Cherokee Nation and the United States which contemplated the payment of simple interest on certain amounts owing by the Government, but nothing to sustain a claim for compound interest.

The Slade and Bender account, accepted by the Cherokee Nation, itself expressly provided for simple interest on the principal items from the date they arose until such time as the principal items should be paid.

III. The judgment of May 18, 1905, rendered by the Court of Claims was not for a lump sum representing the principal and accrued interest to the date of judgment. Such a judgment under applicable statutes would not have borne interest except pending an unsuccessful appeal by the United States.

Under the Slade and Bender audit, the Cherokee Nation was entitled to simple interest on the principal items as of the dates they arose, until such principal items were paid. Recognizing this, the judgment of the Court of Claims was that the Indians be paid the principal items with interest thereon *to date of payment* at the rate of 5 per cent per annum, thus providing for simple interest on the original principal subsequent to the date of the judgment. The rate used by the court was that approved by the Senate in 1850, and used in all contracts with the Cherokee Nation.

The suggestion that principal and accrued interest to date of the judgment be treated as the amount of the judgment and as a new principal on

which interest thereafter should have been calculated is contrary to the terms of the judgment, and is more than the Slade and Bender statement called for.

The Indians received all they were entitled to on the construction of the judgment advanced by the United States.

I

THE ACT OF MARCH 3, 1919, AUTHORIZED THE COURT OF CLAIMS TO REEXAMINE THE INTEREST CLAIM WITHOUT REGARD TO THE FORMER ADJUDICATION

Much of appellant's brief is devoted to a discussion of whether the matter here in controversy has been heretofore adjudicated, and whether Congress has power to waive a former adjudication in favor of the United States, and whether the Act of March 3, 1919, was intended to authorize the Court of Claims to reopen the question as to the method of computation and amount of interest for the period prior to the former judgment rendered by that court May 18, 1905.

The position taken by the United States in the court below may have justified the attention here given these points by the appellant.

We may dispose of all these points by stating that the United States takes the view that the judgment of 1905, determining, as it did, that the principal items in the Slade and Bender account should bear simple interest from the date the original liabilities arose until the principal items were paid, did

adjudicate the method of computation of interest for the period before the date of the judgment and also adjudged that subsequent to the date of the judgment the principal items in the Slade and Bender account should continue to bear simple interest at the rate of 5 per cent per annum " to date of payment," thus negativing the idea that the principal and accrued interest to the date of the judgment should be treated as a new principal.

In this connection, it should be noted that the judgment of the Court of Claims in 1905 was not for a stated sum, calculated to the date of the judgment, but was, by its terms, an adjudication that certain principal items be paid with interest thereon at the rate of 5 per cent per annum until paid.

We take the view, however, that the terms of the Act of March 3, 1919, Chap. 103, 40 Stat. 1316, under which the Court of Claims exercised jurisdiction in this case, considered in the light of the controversy then existing between the United States and the Cherokee Nation, should be construed as a waiver of the defense of *res adjudicāta,* in the interest of complete fairness to the Indians, and as authorizing the Court of Claims to reexamine the matter of interest on the principal items in the Slade and Bender account; that no constitutional limitation stands in the way of such a waiver, and that such a waiver does not deprive this proceeding of the essential characteristics of a judi-

cial proceeding, over which this Court may, within the Constitution, exercise appellate jurisdiction.

We understand the Court of Claims took the same view, and intended to and did reexamine the question of interest, and reiterated its former decision, not because it felt bound by it, but because it believed it to be right.

These concessions leave for consideration only the merits, and the two contentions of the appellant that the principal and accrued interest to March 4, 1895, should have been treated as a new principal sum or, in the alternative, if only simple interest were allowable to the date of the judgment of 1905, a new principal should have been established as of the date of that judgment, made up of the original principal and accrued interest to that date, and which thereafter bore interest at five per centum.

II

THE CONTENTION THAT THE DEFAULT IN PAYING PRINCIPAL AND ACCRUED INTEREST ON MARCH 4, 1895, REQUIRES COMPOUNDING THE INTEREST AS OF THAT DATE IS NOT SUPPORTED BY LEGAL PRINCIPLES OR THE PROVISIONS OF ANY TREATY OR AGREEMENT

The contention of the appellant seems to be that on failure of Congress to appropriate by March 4, 1895, the amount necessary to pay the Slade and Bender account, the principal items thereof, plus the accrued simple interest thereon, became constructively a trust fund in the Treasury of the United States and constituted a new principal, on

which thereafter the Indians were entitled to interest at the rate of 5 per cent per annum.

The agreement of 1891 provided that the United States should render to the Cherokee Nation a complete account of moneys admitted by the United States to be owing to the Cherokee Nation under any prior treaties or Acts of Congress. The Cherokee Nation was given the right within twelve months to enter suit against the United States if it believed the statement to be unjust or incorrect. (R. 3.)

The Slade and Bender statement prepared in accordance with this agreement showed certain principal items due the Cherokee Nation, together with interest thereon from the dates the liabilities arose "to date of payment." This statement was accepted and agreed to by the Cherokee Nation and thus defined the obligation of the United States.

The agreement of 1891 had provided that moneys to discharge these obligations should be appropriated at the session immediately following the accounting. This session ended March 4, 1895, without an appropriation.

As between private individuals, a default by one in a promise to pay to the other a principal sum, with interest thereon until the principal sum is paid, does not result in compounding interest or in creating a new principal as of the date of default, on which interest is to be computed. Compounding interest is generally forbidden, and the only

common exception is in the case of interest coupons. No principle or rule of law has been pointed out by the appellants which justifies the compounding of interest as a result of and on the date of default.

The agreement of 1891, relied on by the appellant to support its claim for compounding interest as of March 4, 1895, contains no provision having that effect. The sixth paragraph (R. 3) fixed the cash consideration intended to be paid for the lands ceded. In that paragraph it was provided:

> So long as the money or any part of it shall remain in the Treasury of the United States after this agreement shall have become effective, such sum so left in the Treasury of the United States shall bear interest at the rate of five per centum per annum, payable semiannually * * *.

This provision had reference to the sum of money specified in the sixth paragraph to be paid as additional consideration for the lands ceded; but if it be given any application to the moneys which might be found owing as provided in the fourth paragraph, it provides only for simple interest and not for compound interest, and should not be construed to go so far as to contemplate that the principal and accrued interest disclosed to be owing to the Indians under the accounting provided for in the fourth paragraph should be treated as a new principal in the Treasury of the United States on which interest should thereafter be calculated. Such an

interpretation is squarely contradicted by the practical interpretation given to the agreement by the United States and the Cherokee Nation through the acceptance of the Slade and Bender statement rendered under the fourth paragraph of the agreement of 1891, and which expressly provided that the principal items therein shown should bear simple interest until paid, an arrangement wholly inconsistent with the contention that such principal items and accrued interest should be treated as a new principal on which interest should be calculated.

The appellant advances, as additional reasons in support of its claim for compound interest, various treaties and statutes. Its principal reliance is the Act of September 11, 1841, Chap. 25, 5 Stat. 465. That Act has no special reference to Indians. It provided, in Section 2:

> That all other funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall in like manner be invested in stocks of the United States, bearing a like rate of interest.

The contention of the appellant is, as we understand it, that this obligation of the United States to the Cherokee Nation should, from and on the date on which the United States promised to pay it, be treated as a trust fund in the Treasury under the terms of the Act of 1841 and should have been invested in stocks of the United States at a rate

of interest not less than 5 per cent per annum. The mere statement of this proposition carries its own answer. The contention that any unsatisfied obligation of the United States, with accrued interest thereon, should be treated as a trust fund in its Treasury on the date the obligation became due should be rejected without further discussion.

The Treaty of 1819 between the United States and the Cherokee Nation, 7 Stat. 195, in Article 4, provided that proceeds of certain lands belonging to the Indians and sold by the United States should be invested in stock of the United States and the interest or dividends on the stock should be applied to educate the Cherokee Indians. There is nothing about this treaty which justifies the contention that, in any event, more than simple interest should be paid.

The Treaty of 1835, 7 Stat. 478, in Article 10, provided that the funds of the Indians held in trust by the United States should be invested and the income applied to the use of the Indians. There is nothing here that has any bearing on the present case.

The Treaty of August 6, 1846, 9 Stat. 871, in Article XI, provided that there should be—

> submitted to the Senate of the United States for its decision * * * the question, whether the Cherokee nation shall be allowed interest on whatever sum may be found to be due the nation, and from what date and at what rate per annum.

And in pursuance of that treaty the Senate of the United States, by Resolution adopted in 1850, provided:

> That it is the sense of the Senate that interest at the rate of 5 per cent per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively,, from the twelfth day of June, eighteen hundred and thirty-eight, until paid.

Here again we find a provision for simple interest on the principal items until the principal items are paid.

The Treaty of 1866, 14 Stat. 799, in Article XXIII, provided:

> All funds now due the nation, or that may hereafter accrue from the sale of their lands by the United States as hereinbefore provided for, shall be invested in United States registered stocks at their current value, and the interest on all said funds shall be paid semi-annually on the order of the Cherokee nation, and shall be applied to the following purposes * * *.

This treaty merely provided for simple interest to be paid semi-annually to the Cherokee Nation.

It was by virtue of the Treaty of 1846 and the Senate Resolution following it that the Court of Claims and this Court, in previous litigation on this subject, determined that the Cherokee Nation was entitled to simple interest at the rate of 5 per cent per annum on the principal items in the Slade and

Bender statement from the dates the liability for those items arose until such date as the principal items should be paid.

Were it not for such provisions in the treaties with the Indians and in the action of the Senate thereon, the Indians would not have been entitled to any interest, as, in the absence of a stipulation to pay interest or a statute allowing it, none can be recovered against the United States.

The contention of the appellant that the funds owing from the United States to the Cherokee Nation should be treated as trust funds in its Treasury, invested in interest-bearing obligations of the United States, demands too little as well as too much. Applied logically, the result would be that the principal items stated in the Slade and Bender account to have been owing from the United States from 1819, and from 1838, and from 1874, and from 1893, should be treated from those dates as trust funds invested for the benefit of the Indians in interest-bearing securities of the United States, and the income thereon reinvested as it accrued, with the result that interest on these various items from the date the original obligations arose should be compounded annually or semiannually for a hundred years or less, thus producing an obligation to the Indians comparable in size to the national debt. Why the failure to pay on March 4, 1895, should be taken as the date for this process is not apparent. These amounts have been continuously

owing, and the United States has been continuously in default thereon from the dates specified in the Slade and Bender statement, and if default in payment is the criterion, that occurred long before 1895.

III

THE CHEROKEE NATION HAS BEEN PAID ALL THE INTEREST TO WHICH IT WAS ENTITLED UNDER THE TERMS OF THE JUDGMENT OF MAY 18, 1905

In the event that its claim to the establishment of the new principal sum as of March 4, 1895, is rejected, appellant presents an alternative claim, based on the judgment of May 18, 1905. This contention is that the principal items in the Slade and Bender statement, plus accrued simple interest thereon at the rate of 5 per centum per annum to the date of that judgment, should be added together to form a new principal sum bearing interest subsequent to the date of the judgment at the rate of 5 per cent per annum, and it contends that the amount of the judgment calculated in this way has not been paid.

Such a contention is opposed to the terms of the judgment itself. Appellant entirely overlooks the fact that the judgment of May 18, 1905, was not a judgment for a stated sum of money calculated by the court.

If on May 18, 1905, a judgment had been entered for a stated sum in favor of the Cherokee Nation, under applicable statutes, that judgment would not

have borne interest, except pending an unsuccessful appeal by the United States, and then at only 4 per centum per annum. To have entered such a judgment would have been to disregard the agreement contained in the acceptance of the Slade and Bender audit. That statement expressly provided that the principal items therein named should bear interest from the dates the liability for the items arose until such date as the principal items should be paid. To carry out this arrangement it was necessary that the judgment of the Court of Claims should conform to it, and so that judgment provided and decreed that the United States should pay to the Cherokee Nation the principal items specified in the Slade and Bender statement, with interest thereon at the rate of 5 per centum per annum "*to date of payment.*" This judgment, therefore, specified the rate, the method of computation of interest, and the principal amounts on which interest should be computed, for such period subsequent to the date of the judgment as might elapse before payment was made. To alter this arrangement by treating the principal items in the Slade and Bender statement and the accrued interest to the date of the judgment as a new principal sum, on the theory that judgment was entered for such an amount, would be to disregard the express provisions of that judgment. It is obvious, therefore, that the appellant may not successfully contend that payment has not been made in accordance

with the provisions of that judgment, unless it be shown that the amounts paid by the United States in satisfaction of the judgment are less than the principal items of the Slade and Bender statement, with simple interest thereon at the rate of 5 per centum per annum from the dates specified in the judgment to the date of ultimate payment.

Appellant has not contended that payments made by the United States are not sufficient to discharge the judgment so construed. As a matter of fact, the method of computation adopted by the Treasury Department in the satisfaction of this judgment resulted in the payment to the Indians of more than the strict terms of the judgment called for, and the method adopted by the Treasury Department was afterwards ratified and approved by Congress. The method adopted by the Treasury Department may be illustrated by considering what was done with respect to Item 1 in the Slade and Bender statement. That item was for the principal sum, $2,125.00, and, under the Slade and Bender statement and the judgment of 1905, the Cherokee Nation was entitled to the payment of $2,125 with simple interest thereon at the rate of 5 per cent per annum from February 27, 1819, until the date the principal item was paid.

The Treasury Department did not follow the interpretation of the judgment which the Government now stands on, nor did it adopt the view of the appellant that the judgment should be considered as establishing a new principal as of May 18,

1895. The Treasury Department calculated simple interest on this principal item at the rate of 5 per cent per annum from February 27, 1819, to December 29, 1905, which was the date the transcript of the judgment was filed in the Treasury Department. To this extent it recognized that the judgment was not for a stated sum, and it gave effect to the terms of the judgment that the principal items should bear simple interest at the rate of 5 per cent per annum subsequent to the date of the judgment. The total of the principal and interest so computed was then treated as a new principal as of December 29, 1905, the date of the filing of the transcript in the Treasury, and interest was allowed on such new principal at 4 per cent per annum from December 30, 1905, to May 14, 1906, the date of the issuance of the mandate of this Court. (R. 21.) This new total of $11,520.46 was paid to the Secretary of the Interior for the account of the Cherokee Nation on July 2, 1906. (R. 23.) This allowance and computation of interest was made on the supposed authority of the Act of September 30, 1890, Chap. 1126, 26 Stat. 504, 537, which provides:

> That hereafter it shall be the duty of the Secretary of the Treasury to certify to Congress for appropriation only such judgments of the Court of Claims as are not to be appealed, or such appealed cases as shall have been decided by the Supreme Court to be due and payable. And on judgments in

> favor of claimants which have been appealed by the United States and affirmed by the Supreme Court, interest, at the rate of four per centum per annum, shall be allowed and paid from the date of filing the transcript of judgment in the Treasury Department up to and including the date of the mandate of affirmance by the Supreme Court: *Provided,* That in no case shall interest be allowed after the term of the Supreme Court at which said judgment was affirmed.

This statute was manifestly intended to apply to the usual cases where judgments against the United States bore no interest and not to a special case where a judgment against the United States in the Court of Claims provided for interest after its entry. The statute was intended to penalize the United States for delay in payment pending an unsuccessful appeal by it to the Supreme Court. It is obvious that where the judgment in the Court of Claims is not for a stated sum, but itself contemplates and provides for a computation and allowance of interest on items included in the judgment for a period subsequent to the date of the judgment, the statute referred to has no application. Furthermore, the statute only allows interest pending appeal upon the amount of the judgment for the period from the date of the filing of the transcript with the Treasury to date of affirmance. In the present case, the Treasury Department had obvious difficulty in applying the statute, because the

judgment was not for any definite amount, and the Treasury Department surmounted this difficulty by calculating interest at the rate of 5 per cent per annum on the principal items covered by the judgment up to the date of the filing of the transcript, and treated this as the amount of the judgment on which it allowed 4 per cent pending appeal. By using this method of calculation the Treasury disregarded the provision of the judgment that the principal items covered by it should bear interest at the rate of 5 per cent per annum until paid. However, the method used by the Treasury resulted in the payment of more money to the Cherokee Nation than a correct interpretation of the judgment required, because the 4 per cent per annum calculated on the original principal and interest accrued to December 29, 1905, resulted in the payment of a larger sum than would the calculation of 5 per cent per annum simple interest on the original principal item from 1819 to the date of payment in 1906. Some Appropriation Acts passed by Congress subsequent to the date of the judgment of 1905 show that Congress accepted the method of calculation adopted by the Treasury Department. This prevents the United States from asserting a counterclaim for overpayment, but it does not entitle the Cherokee Nation to more money than it has received.

An analysis of the method used by the Treasury Department in satisfying the various other items covered by the judgment of 1905 will be found in

the appendix. It is sufficient to say that the amounts actually paid in all cases equalled or exceeded the amount owing on the view that the judgment by its terms contemplated simple interest on the original principal to the ultimate date of the payment.

CONCLUSION

Reexamining the questions involved, in disregard of the former adjudication, it is clear that the Court of Claims and this Court reached a correct conclusion in the former litigation in allowing only simple interest on the principal items covered by the Slade and Bender account from the dates the liability for those items arose to the date of ultimate payment of the principal items. It is also apparent that, treating the judgment of 1905 as correct and giving it a proper interpretation, the Cherokee Nation has been paid all that the judgment required.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

HERMAN J. GALLOWAY,
Assistant Attorney General.

FEBRUARY, 1926.

APPENDIX

DISCUSSION OF ITEM 2

The principal of Item 2 amounts to $1,111,284.70. The Treaty of 1835 provided for the cession of certain lands by the Cherokee Indians to the United States and the payment of the sum of $5,000,000 to the Indians by the United States for such land. Certain deductions were to be made from said treaty fund of $5,000,000 on account of the claims and expenditures for which the Indians should pay the United States. Certain investments, which were proportionately small in amount were to be made by the United States in trust funds out of this treaty fund for the benefit of the Indians and the balance of such treaty fund was to be distributed per capita among the Indians. This Treaty of 1835, together with its amendments in 1836, were disputed by certain of the Cherokees, and finally the Indians removed from the eastern lands in 1838. All of the Cherokees were brought in under the provisions of the Treaty of 1835 by the Treaty of 1846, which last named treaty, among other things, provided for a reference to the Senate of the United States for a determination of the question whether any interest should be paid to the Cherokees upon any amounts that might be due to them. The Senate, by resolution, in 1850, provided that interest should be paid upon such sums at the rate of 5% per annum from June 12, 1838 "*until paid.*" On June 12, 1838 (5 Stat. 242)

Congress appropriated an amount of money to pay for the removal of the Cherokees from the east to the west and provided that no part thereof should be deducted from the $5,000,000 fund. (40 C. Cls. 270.)

Only about $49,000 of this sum was used to pay such removal expense, and the sum of $1,111,284.70 was paid from the $5,000,000 fund to meet the expenses of such removal. (40 C. Cls. 271.) The Record does not show by any affirmative statement that the small trust funds provided for in the Treaty of 1835 were actually paid. However, such sums were proportionately very small, and it must be assumed that they were paid as provided, as this claim for approximately $1,000,000 is for a balance, and as the Court of Claims in its decision in 40 C. Cls. 252, and this Court in its decision in 202 U. S. 101, provided that the payment of this balance should be made not to a trust fund but for per capita distribution. Further than this, the appellant has not shown that any of such trust items were not actually paid as provided for in said Treaty of 1835, and we may therefore safely say and assume that these items were actually paid, and that in accordance with the decisions of this Court and the Court of Claims the principal sum of Item 2 was not a trust fund but one for per capita distribution.

We have heretofore shown that the Treaty of 1846, and the Senate Resolution of 1850, did not provide for compound interest and that the agreement of 1891 contained no provisions which would require or justify the payment of compound interest. Neither this treaty, the resolution, nor the agreement made the principal of Item 2 a trust

fund. The Slade and Bender account provided for interest upon this item " from June 12, 1838, to date of payment." (R. 17.) The judgment of the Court of Claims rendered May 18, 1905, provided for interest upon Item 2 as follows (R. 19):

> With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.

The transcript of this judgment was filed in the Treasury on December 29, 1905. (R. 21.) The mandate of this Court, affirming such judgment, was issued on May 14, 1906. (R. 21.) The Appropriation Act of June 30, 1906 (34 Stat. 634, 664), provided—

> To pay the judgment rendered by the Court of Claims on May eighteenth, nineteen hundred and five * * * aggregating a principal sum one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, as therein set forth, with interest upon the several items of judgment at five per centum, one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, together with such additional sum as may be necessary to pay interest, as authorized by law.

The roll of the individual Cherokees entitled to the per capita distribution of Item 2 was not approved by the Court of Claims until March 15, 1910. (R. 20.) Over $250,000 was paid to the representatives of the Cherokees for attorneys' fees and expenses at various times between July 2, 1906, and March 15, 1910. (R. 23.) The exact dates of such

payments are not shown in the record. The Act of March 4, 1909 (35 Stat. 907, 938, 939), provided that, as to Item 2 of this judgment, the Appropriation Act of June 30, 1906, which appropriated for the payment thereof—

> shall be so construed as to carry interest on said item 2 up to such time as the roll of the individual beneficiaries entitled to share in said judgment shall be finally approved by the Court of Claims, and for the payment of said interest a sufficient sum is hereby appropriated.

In all the above there is nothing which provides for the compounding of interest upon Item 2, nor is there anything that makes Item 2 a trust fund.

In the payment of this judgment the United States computed interest upon the original principal sum of $1,111,284.70 at 5% per annum from June 12, 1838 (the date the principal sum was withdrawn from the $5,000,000 treaty fund), to December 29, 1905 (the date of filing the transcript in the Treasury), and then upon the new principal consisting of the total of the old principal and the interest as above set out the United States computed interest at the rate of 4% per annum from December 30, 1905 (the date of filing the transcript in the Treasury), to May 14, 1906 (the date of the issue of the mandate by this Court). This allowance of interest at the rate of 4% apparently was made in accordance with the supposed authority of the Act of September 30, 1890 (26 Stat. 504, 537), which has been set out in the discussion under Item 1, and which we feel was inapplicable, but certainly resulted in an overpayment instead of an underpayment in this case.

The Record shows that the United States then paid as additional interest under the Act of March 4, 1909, which amended the Appropriation Act of June 30, 1906, the sum of $161,324.92. (R. 21.) The Record does not show just how this additional interest was computed, but it could not have been interest upon a new principal consisting of the old principal together with the interest accrued to the date of the filing of the transcript, as such sums totaled approximately $5,000,000, and interest for one year at 5% upon that sum would be approximately $250,000. We therefore must assume from the Record that the additional interest was computed upon the original principal of $1,111,284.70, from which deductions had been made at proper times for the attorneys' fees and expenses which had been paid out of the same.

The original Appropriation Act of June 30, 1906 (34 Stat. 634, 664), provided for the payment of the judgment—

> aggregating a principal sum of one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, as therein set forth, with interest upon the several items of judgment at five per centum, one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, together with such additional sum as may be necessary to pay interest, as authorized by law.

The total of the principal items amounted to the sum of $1,134,248.23 (R. 19), without the addition

of any interest. This is the same sum as is twice specified in the Appropriation Act of 1906. The statute also provided for the payment of interest "as authorized by law." This does not change the existing statutes in any way, and we have heretofore seen that up to that time there were no statutes or treaties requiring the compounding of interest. This Appropriation Act does not require the compounding of interest. The Act of March 4, 1909 (35 Stat. 907, 938, 939), was an amendment of the Appropriation Act of June 30, 1906, and provided as follows:

> That the general deficiency appropriation Act of June thirtieth, nineteen hundred and six, so far as the same provides for the payment of item 2 of the judgment of the Court of Claims of May eighteenth, nineteen hundred and five, in favor of the Eastern Cherokees, shall be so construed as to carry interest on said item 2 up to such time as the roll of the individual beneficiaries entitled to share in said judgment shall be finally approved by the Court of Claims, and for the payment of said interest a sufficient sum is hereby appropriated.

This section merely amends the old Appropriation Act and identifies the judgment as provided for in such Act of June 30, 1906, and it will be recalled that the Act of June 30, 1906, provides for the payment of the principal sum with interest and creates no obligation to compound such interest. The new act providing for the payment of interest between the dates specified in such Act creates no obligation, right or duty to compound such interest.

The use of the word " judgment " in the new Act is the same as in the Act of June 30, 1906, which it amends, and the Act of June 30, 1906, has been shown to mean by the word " judgment " the total principal sums of the four items comprising such judgment.

We submit, therefore, that the United States has paid to the appellant more than is due to it, both principal and interest, in accordance with the applicable treaties, laws, and agreements.

DISCUSSION OF ITEM 4.

The principal, $20,406.25, of Item No. 4 arises under the Act of March 3, 1893 (Chap. 209, 27 Stat. 612, 638). The origin of this item is as follows (House Executive Document 182, Third session, 53d Congress, 1894–1895, Vol. 32, p. 29):

On June 4, 1863, $15,000 belonging to the Choctaw Orphan Reservation Fund was expended for the relief of persons belonging to the Cherokee Nation. The transaction disappeared from sight and was brought to light in 1890, and the $15,000 principal was restored to the Choctaw fund by the Act of August 19, 1890 (Chap. 807, 26 Stat. 336, 340). By the Act of March 3, 1893 (27 Stat. 612, 638), interest on this $15,000 from June 4, 1863, to August 18, 1890, and amounting to $20,406.25 was paid to the Choctaw fund and charged to the Cherokee invested fund. The Slade and Bender account determined that as the Cherokees in 1863 had sufficient money to have supplied this $15,000 which was erroneously taken from the Choctaw fund, it would be improper and unfair to compel the Cherokees to lose the interest thereon; and therefore determined that the Cherokees should be

paid by the United States this sum of $20,406.25 which had been charged to their invested funds by the Act of 1893. The Act of March 3, 1893, provided (27 Stat. 639)—

> that any amount that may be found due by the Secretary shall be credited to the Choctaw fund charged to the Cherokee fund.

There is nothing in this Act that requires the payment of compound interest.

It seems to have been considered by the parties to this transaction that Item 4 was a trust fund. Assuming that such item was a trust fund, the specific provisions of Article 23 of the Treaty of 1866 (14 Stat. 799, 805) would be applicable, and that Article is as follows:

> All funds now due the nation, or that may hereafter accrue from the sale of their lands by the United States as hereinbefore provided for, shall be invested in United States registered stocks at their current value, and the interest on all said funds shall be paid semi-annually on the order of the Cherokee Nation, * * *.

It was then provided that a certain portion of such interest should be applied for educational purposes, another portion to the Orphan Fund, and 50% for general purposes. Strictly speaking, Item 4 is therefore not a trust fund, but is an invested fund with provisions that the interest when earned shall be immediately distributed. If it was not so distributed, as against the United States, such breach would not create a right for the compounding of the interest. It is desired also to further point out that Article 23 of the Treaty of 1866 removes any application of the Act of September 11, 1841

(5 Stat. 465), upon which appellant relies, if such statute ever had any application. The statute of 1841 by its very terms has no application if the interest is otherwise provided for by treaty; and certainly the Treaty of 1866, as above shown, does otherwise provide.

We thus see that the source of this item creates no obligation or right for the compounding of interest. We have heretofore shown in the discussion of the other items that the agreement of 1891 did not justify the compounding of interest. The judgment of the Court of Claims on May 18, 1905, provided for the principal sum "with interest thereon from July 1, 1903, to date of payment." (R. 19.) The transcript was filed in the Treasury Department on December 29, 1905. (R. 21.) The mandate of this Court affirming the judgment of the Court of Claims was issued on May 14, 1906. (R. 21.) On June 30, 1906, the Act appropriating for the payment of this judgment (34 Stat. 634, 664) was approved, which appropriated for the total of the items of the principal of said judgment "together with such additional sum as may be necessary to pay interest, as authorized by law." This created no right to compounded interest. On July 2, 1906, there was paid to the Secretary of the Interior on account of Item 4 the sum of $23,294.93. (R. 23.) The Act of June 30, 1919 (41 Stat. 3, 22), provided for the payment of additional interest upon Item 4 as follows:

> on the amount of the fund which arose from item 4 of said judgment, as such amount was determined and paid to the Secretary of the Interior on July 2, 1906, to be by him cred-

ited to the principal of the Cherokee national fund, interest at 5 per centum per annum from July 2, 1906, to and including May 26, 1910; on the original principal sum of item 4 of said judgment, interest at 5 per centum per annum from July 1, 1893, to July 1, 1903, and on the amount of the interest thus accruing interest at 4 per centum per annum from December 29, 1905, to May 14, 1906; and on the aggregate of the sums of the interest for the last two periods hereinabove mentioned, interest at 5 per centum per annum from July 2, 1906, to the date of the passage of this Act; and the sum of $27,500, or so much thereof as may be necessary, to pay the interest above allowed, is hereby appropriated and authorized to be paid to the Cherokee Nation: *Provided,* That the Secretary of the Treasury is hereby authorized and directed to pay the amount arising from item 4 of said judgment, with interest thereon as hereinabove provided for, to the agent appointed by the Cherokee Nation acting through its principal chief to receive the same, said payment to be made immediately upon the approval of this Act.

It will be hereafter shown that the exact provisions of this statute were followed.

Now let us see how the United States actually computed the amounts which it paid upon this judgment. (R. 22.) The principal was $20,406.25; interest was computed from July 1, 1903, at 5% per annum to December 29, 1905 (the date of filing the transcript in the Treasury). This omitted a

period of 10 years between July 1, 1893 (the date upon which the moneys were actually withdrawn from the Cherokee fund to reimburse the Choctaw fund) to July 1, 1903, but that period was covered by the Act of June 30, 1919, and the subsequent payments made thereunder. Upon the total of the principal and the interest from July 1, 1903, to December 29, 1905, interest was again computed from December 30, 1905 (the date of filing the transcript in the Treasury) to May 14, 1906 (the date of the issue of the mandate by this Court). (R. 22.)

The record does not state whether this was at 4% or 5%. However, mathematical calculation proves it to be at 4%, and therefore it was made under the provisions of the Act of September 30, 1890 (26 Stat. 504, 537), which has been heretofore discussed and shown to be inapplicable and to have resulted in an overpayment to appellant instead of an underpayment. The total of all of these items was then paid on July 2, 1906, to the Secretary of the Interior (R. 23), which was within two days after the Act of June 30, 1906, appropriating for the payment of the judgment. However, the Act of June 30, 1919, as above shown, provided that additional interest at 5% per annum from July 2, 1906, to May 26, 1910, should be paid, and that on the original principal of Item 4 interest at 5% per annum from July 1, 1893, to July 1, 1903, and on the amount of the interest thus accrued interest at 4% per annum from December 29, 1905, to May 14, 1906 (the interim between the filing of the transcript in the Treasury and the mandate of this Court), and upon the aggregate sum of interest for the last

two periods, interest at 5% per annum from July 2, 1906, to the date of the passage of this Act which was June 30, 1919.

Under such Act, the Government calculated interest at 5% from July 2, 1906, to November 3, 1906 (the date of the payment of attorneys' fees under said judgment) (R. 23), upon the total of the original principal, together with the interest as the Government had formerly computed the same. This was strictly in accordance with the Act of June 30, 1919. The Government then computed interest upon this same total, less attorneys' fees, from November 4, 1906 (the date of payment of attorneys' fees), to May 26, 1910 (the date fixed in the Act of June 30, 1919). This also was in accordance with the provisions of the Act of June 30, 1919.

The Government then computed interest at 5% upon the original principal of Item 4 from July 1, 1893, to July 1, 1903, which amounted to $10,203.12, and then computed interest upon this sum at 4% from December 30, 1905, to May 14, 1906 (the dates specified in the statute, also being the dates between the filing of the transcript and the issue of the mandate of this Court), and then computed interest at 5% upon the total of these last two sums of interest from July 2, 1906, to June 30, 1919 (the dates specified in the Act of June 30, 1919). All of this was strictly in accordance with the Act of June 30, 1919, and the totals of such sums were paid to the Secretary of the Interior on or about August 7, 1919. (R. 23.)

We submit to the Court that as to Item 4, there is nothing in any of such agreements that would jus-

tify, warrant or require the payment of compound interest, and that appellant has been paid more than it is entitled to receive.

DISCUSSION OF ITEM 3

The principal of this item is $432.28. It is so small that it seems hardly worthy of consideration. However, in order to make the discussion complete, we shall proceed to consider the same. This item arose as a balance due to the Cherokee Indians under the Treaty of 1866 (14 Stat. 799, 804, 805) wherein it was provided that the Government might sell certain lands of the Cherokees, the proceeds of such sale to go to the benefit of the Nation. Article 23 of that treaty (14 Stat. 805) provided that—

> All funds now due the nation, or that may hereafter accrue from the sale of their lands by the United States as hereinbefore provided for, shall be invested in United States registered stocks at their current value, and the interest on all said funds shall be paid semi-annually on the order of the Cherokee Nation, and shall be applied to the following purposes, * * *.

Then follows a provision that 35% of the accruing interest should be applied for educational purposes, 15% for the benefit of orphans, and 50% for general purposes. As hereinbefore discussed in connection with Item 4, this article of the treaty removed all application and effect of the Act of September 11, 1841 (5 Stat. 465)—if it ever had any application—and provided for the payment of the interest immediately after its accrual. If a

default was made in such payment, it did not justify the compounding of the interest as against the United States. Nothing else in the statute or treaty justified such compounding of interest.

We have also heretofore shown that the agreement of 1891 did not require the compounding of interest upon this item. The Slade and Bender account provided as to Item 3 that the principal should be paid " with interest from January 1, 1874 to date of payment." (R. 17.) The judgment of the Court of Claims entered on May 18, 1905, provided for the payment of the principal " with interest thereon at the rate of 5% from January 1, 1874, to date of payment." (R. 19.) Neither of these created any obligation for compound interest. The judgment of the Court of Claims was rendered on May 18, 1905. (R. 19.) The transcript was filed in the Treasury on December 29, 1905. (R. 21.) The mandate of this Court was issued on May 14, 1906. (R. 21.) The Act appropriating for the payment of this judgment was approved June 30, 1906 (34 Stat. 634, 664), and we have heretofore shown that this appropriation appropriated for the payment of the total of the principal items of that judgment " with such additional sums as may be necessary to pay interest, as authorized by law "; and that such Act did not require the compounding of interest. Neither the subsequent Act of March 4, 1909 (35 Stat. 907) nor the Act of June 30, 1919 (41 Stat. 3) had any application whatever to Item 3 of this judgment. Therefore, we submit that there was nothing in the law requiring the compounding of interest.

Now let us see what the Government has paid under this item. (R. 22.) The principal was

$432.28. Interest at 5% was computed from January 1, 1874 to December 29, 1905 (the date of filing the transcript in the Treasury). Upon the total of the original principal and this interest, additional interest at 4% was computed from December 30, 1905 (the date of filing the transcript in the Treasury), to May 14, 1906 (the date of the issue of the mandate by this Court). This interest at 4%, as we have already seen in connection with the other items of this judgment, was paid under the Act of September 30, 1890 (26 Stat. 504, 537), and was, as heretofore shown, improper. The total amount of principal and $708.21 interest was paid on July 2, 1906. (R. 23.) Interest at 5% upon $432.28 from January 1, 1874, to July 2, 1906, amounts to $702.44, and therefore upon Item 3 appellant has also been overpaid.

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